

Jul 01, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARK LEROY D.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 2:20-CV-00094-FVS

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 12 and 16. This matter was submitted for consideration without oral argument. The Plaintiff is represented by Attorney Bryant Sutton. The Defendant is represented by Special Assistant United States Attorney Leisa A. Wolf. The Court has reviewed the administrative record, the parties' completed briefing, and is fully informed. For the reasons discussed below, the Court **GRANTS** Defendant's Motion for Summary Judgment, ECF No. 16, and **DENIES** Plaintiff's Motion for Summary Judgment, ECF No. 12.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ~ 1

JURISDICTION

Plaintiff Mark Leroy D.¹ protectively filed for disability insurance benefits on February 8, 2017, alleging a disability onset date of July 1, 2016. Tr. 183-84. Benefits were denied initially, Tr. 94-96, and upon reconsideration, Tr. 100-02. Plaintiff requested a hearing before an administrative law judge (“ALJ”), which was held on January 17, 2019. Tr. 28-71. Plaintiff was represented by counsel and testified at the hearing. *Id.* The ALJ denied benefits, Tr. 12-27, and the Appeals Council denied review. Tr. 1. The matter is now before this Court pursuant to 42 U.S.C. § 405(g).

BACKGROUND

The facts of the case are set forth in the administrative hearing and transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner. Only the most pertinent facts are summarized here.

Plaintiff was 62 years old at the time of the hearing. Tr. 32. He completed high school. Tr. 33. He lives with his wife. *See* Tr. 57. Plaintiff has work history as a construction worker, house painter, metal fabricator, and CNC mill operator. Tr. 34-37, 41. He testified that he could not go back to work because he gets very little sleep every night, and therefore cannot concentrate and has “zero energy”

¹ In the interest of protecting Plaintiff’s privacy, the Court will use Plaintiff’s first name and last initial.

1 during the day. Tr. 38-39. Plaintiff also reported that he did not have an issue with
2 his previous employer due to “not sleeping”; rather, he was unable to keep working
3 at that job after he sustained his shoulder injury when skiing. Tr. 60.

4 Plaintiff testified that he has restless leg syndrome “constantly,” and cannot
5 sit for more than 15 minutes before he has to move around. Tr. 52. He takes
6 medication but testified that he has not had a “full night’s sleep” in five or six
7 years, and usually gets between three-and-a-half to four-and-a-half hours of sleep
8 on an average night. Tr. 54-55. Plaintiff reported he has sleep apnea, did not
9 tolerate the CPAP machine, and uses a mouth guard that is effective in reducing his
10 symptoms. Tr. 58. He testified that his “back is stiff constantly”; he has back pain
11 around a three or four out of ten all the time; once every six months he has a “flare-
12 up” of back pain that is ten out of ten on a pain scale; and at the time of the hearing
13 he was in the middle of a “flare-up” of back pain that he rated at a six out of ten.
14 Tr. 62-65. Plaintiff reported that he spends three to four hours a day “up and
15 down” from an easy chair and the couch. Tr. 67.

16 STANDARD OF REVIEW

17 A district court’s review of a final decision of the Commissioner of Social
18 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
19 limited; the Commissioner’s decision will be disturbed “only if it is not supported
20 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
21 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a

1 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159
2 (quotation and citation omitted). Stated differently, substantial evidence equates to
3 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and
4 citation omitted). In determining whether the standard has been satisfied, a
5 reviewing court must consider the entire record as a whole rather than searching
6 for supporting evidence in isolation. *Id.*

7 In reviewing a denial of benefits, a district court may not substitute its
8 judgment for that of the Commissioner. “The court will uphold the ALJ's
9 conclusion when the evidence is susceptible to more than one rational
10 interpretation.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.
11 2008). Further, a district court will not reverse an ALJ’s decision on account of an
12 error that is harmless. *Id.* An error is harmless where it is “inconsequential to the
13 [ALJ’s] ultimate nondisability determination.” *Id.* (quotation and citation omitted).
14 The party appealing the ALJ’s decision generally bears the burden of establishing
15 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

16 FIVE-STEP EVALUATION PROCESS

17 A claimant must satisfy two conditions to be considered “disabled” within
18 the meaning of the Social Security Act. First, the claimant must be “unable to
19 engage in any substantial gainful activity by reason of any medically determinable
20 physical or mental impairment which can be expected to result in death or which
21 has lasted or can be expected to last for a continuous period of not less than twelve

1 months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment must be
2 “of such severity that he is not only unable to do his previous work[,] but cannot,
3 considering his age, education, and work experience, engage in any other kind of
4 substantial gainful work which exists in the national economy.” 42 U.S.C. §
5 423(d)(2)(A).

6 The Commissioner has established a five-step sequential analysis to
7 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
8 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s
9 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in
10 “substantial gainful activity,” the Commissioner must find that the claimant is not
11 disabled. 20 C.F.R. § 404.1520(b).

12 If the claimant is not engaged in substantial gainful activity, the analysis
13 proceeds to step two. At this step, the Commissioner considers the severity of the
14 claimant’s impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers
15 from “any impairment or combination of impairments which significantly limits
16 [his or her] physical or mental ability to do basic work activities,” the analysis
17 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant’s impairment
18 does not satisfy this severity threshold, however, the Commissioner must find that
19 the claimant is not disabled. 20 C.F.R. § 404.1520(c).

20 At step three, the Commissioner compares the claimant’s impairment to
21 severe impairments recognized by the Commissioner to be so severe as to preclude

1 a person from engaging in substantial gainful activity. 20 C.F.R. §
2 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the
3 enumerated impairments, the Commissioner must find the claimant disabled and
4 award benefits. 20 C.F.R. § 404.1520(d).

5 If the severity of the claimant's impairment does not meet or exceed the
6 severity of the enumerated impairments, the Commissioner must pause to assess
7 the claimant's "residual functional capacity." Residual functional capacity (RFC),
8 defined generally as the claimant's ability to perform physical and mental work
9 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
10 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

11 At step four, the Commissioner considers whether, in view of the claimant's
12 RFC, the claimant is capable of performing work that he or she has performed in
13 the past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is
14 capable of performing past relevant work, the Commissioner must find that the
15 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of
16 performing such work, the analysis proceeds to step five.

17 At step five, the Commissioner considers whether, in view of the claimant's
18 RFC, the claimant is capable of performing other work in the national economy.
19 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner
20 must also consider vocational factors such as the claimant's age, education and
21 past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant is capable of

1 adjusting to other work, the Commissioner must find that the claimant is not
2 disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of adjusting to
3 other work, analysis concludes with a finding that the claimant is disabled and is
4 therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

5 The claimant bears the burden of proof at steps one through four above.
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
7 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
8 capable of performing other work; and (2) such work “exists in significant
9 numbers in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*,
10 700 F.3d 386, 389 (9th Cir. 2012).

11 **ALJ’S FINDINGS**

12 At step one, the ALJ found that Plaintiff has not engaged in substantial
13 gainful activity since July 1, 2016, the alleged onset date. Tr. 17. At step two, the
14 ALJ found that Plaintiff has the following severe impairments: restless leg
15 syndrome; obstructive sleep apnea; chronic insomnia; a tear of right upper
16 extremity supraspinatus tendon/adhesive capsulitis; and recurrent back strain. Tr.
17 17. At step three, the ALJ found that Plaintiff does not have an impairment or
18 combination of impairments that meets or medically equals the severity of a listed
19 impairment. Tr. 18. The ALJ then found that Plaintiff has the RFC

20 to perform light work as defined in 20 CFR 404.1567(b) in so much as
21 he has the capacity to lift and/or carry 20 pounds occasionally and ten
pounds frequently; stand and/or walk for a total of six hours, and sit for
a total of six hours, with normal breaks. The claimant is limited to

1 frequent push and/or pull with right upper extremity. He is limited to
2 no climbing of ladders, ropes, or scaffolds. The claimant is limited to
3 frequent crawling. He is limited to frequent reach in all directions with
4 the right upper extremity.

5 Tr. 18. At step four, the ALJ found that Plaintiff was capable of performing past
6 relevant work as a mill operator. Tr. 22. On that basis, the ALJ concluded that
7 Plaintiff has not been under a disability, as defined in the Social Security Act, from
8 July 1, 2016, through the date of the decision. Tr. 23.

9 ISSUES

10 Plaintiff seeks judicial review of the Commissioner's final decision denying
11 her disability insurance benefits under Title II of the Social Security Act. ECF No.

12 12. Plaintiff raises the following issues for this Court's review:

- 13 1. Whether the ALJ properly considered Plaintiff's symptom claims; and
- 14 2. Whether the ALJ erred at step four.

15 DISCUSSION

16 A. Plaintiff's Symptom Claims

17 An ALJ engages in a two-step analysis when evaluating a claimant's
18 testimony regarding subjective pain or symptoms. "First, the ALJ must determine
19 whether there is objective medical evidence of an underlying impairment which
20 could reasonably be expected to produce the pain or other symptoms alleged."

21 *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not
required to show that her impairment could reasonably be expected to cause the

1 severity of the symptom he has alleged; he need only show that it could reasonably
2 have caused some degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591
3 (9th Cir. 2009) (internal quotation marks omitted).

4 Second, “[i]f the claimant meets the first test and there is no evidence of
5 malingering, the ALJ can only reject the claimant’s testimony about the severity of
6 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
7 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
8 citations and quotations omitted). “General findings are insufficient; rather, the
9 ALJ must identify what testimony is not credible and what evidence undermines
10 the claimant’s complaints.” *Id.* (quoting *Lester*, 81 F.3d at 834); *Thomas v.*
11 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ must make a credibility
12 determination with findings sufficiently specific to permit the court to conclude
13 that the ALJ did not arbitrarily discredit claimant’s testimony.”). “The clear and
14 convincing [evidence] standard is the most demanding required in Social Security
15 cases.” *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm’r of Soc. Sec.*
16 *Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

17 Here, the ALJ found Plaintiff’s medically determinable impairments could
18 reasonably be expected to cause some of the alleged symptoms; however,
19 Plaintiff’s “statements concerning the intensity, persistence and limiting effects of
20 these symptoms are not entirely consistent with the medical evidence and other
21 evidence in the record” for several reasons. Tr. 19.

1 *1. Lack of Objective Medical Evidence*

2 First, as to his claims of disabling back pain, the ALJ noted “few specific
3 abnormal objective findings of ongoing back problems after the alleged onset
4 date,” and “few complaints in the record of back pain.” Tr. 19. An ALJ may not
5 discredit a claimant’s pain testimony and deny benefits solely because the degree
6 of pain alleged is not supported by objective medical evidence. *Rollins v.*
7 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341,
8 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989).
9 However, the medical evidence is a relevant factor in determining the severity of a
10 claimant’s pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §
11 404.1529(c)(2). In support of this finding, the ALJ cited the results of the June
12 2016 x-rays of Plaintiff’s cervical and lumbar spine that generally noted, without
13 any comment as to severity, a “narrowing” of the cervical spine and “degenerative
14 changes” in the lower lumbar spine. Tr. 19 (citing Tr. 319). Plaintiff does not
15 challenge this finding with specificity in his opening brief; rather, as discussed in
16 detail below, his argument is confined to the ALJ’s finding that Plaintiff failed to
17 pursue treatment for his alleged back pain. Thus, the Court declines to address this
18 finding. *See Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th
19 Cir. 2008). The lack of corroboration of Plaintiff’s claimed back pain by objective
20 medical evidence was a clear, convincing, and unchallenged reason for the ALJ to
21 discount Plaintiff’s symptom claims. *See Burch v. Barnhart*, 400 F.3d 676, 680

1 (9th Cir. 2005) (minimal objective evidence is a factor which may be relied upon
2 in discrediting a claimant’s testimony, although it may not be the only factor).

3 *2. Failure to Seek and Comply with Treatment*

4 Second, the ALJ found that Plaintiff failed to seek treatment for his back
5 pain, delayed treatment for shoulder pain, and failed to comply with treatment
6 recommendations regarding his complaints of restless leg syndrome and insomnia
7 Tr. 19-22. Unexplained, or inadequately explained, failure to seek or comply with
8 treatment may be the basis for rejecting Plaintiff’s symptom claims unless there is
9 a showing of a good reason for the failure. *Orn v. Astrue*, 495 F.3d 625, 638 (9th
10 Cir. 2007).

11 First, the ALJ found that, aside from ongoing chiropractic treatment,
12 Plaintiff “did not receive any other regular treatment for his back, such as follow-
13 up with an orthopedist. . . . [And he] also did not seek regular or frequent
14 emergency intervention for back pain exacerbations.” Tr. 20. Plaintiff generally
15 argues that the ALJ “mischaracterized” the medical record by “referencing one
16 note from 2016 and another from 2018, and then found that ‘[t]he claimant did not
17 receive any other regular treatment for his back[.]’ However, this completely
18 ignores the more than 200 pages in the record of regular chiropractic treatment
19 from January 2016 through December 2018.” ECF No. 12 at 12 (citing Tr. 598-
20 803). This argument is inapposite because the ALJ explicitly noted that “the only
21 regular treatment [Plaintiff] sought for his back was chiropractic follow-up.” Tr.

19. However, the ALJ additionally found that “[h]is chiropractic notes were very similar from appointment to appointment and did not describe disabling symptoms. The objective findings from these notes were vague, noting areas of ‘hypomobility’ and ‘mild hypertonicity.’” Tr. 19 (citing Tr. 598-803 (uniformly noting that Plaintiff’s “current treatment plan seems to be effective”). Evidence of “conservative treatment” is sufficient to discount a claimant's testimony regarding the severity of an impairment. *See Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007). Moreover, regardless of evidence that could be considered favorable to Plaintiff, it was reasonable for the ALJ to find that Plaintiff’s failure to pursue treatment aside from “regular” chiropractic care, which included only vague objective findings and “very similar” notes across the entire course of treatment, was inconsistent with the severity of Plaintiff’s claimed back pain. Tr. 19. “[W]here evidence is susceptible to more than one rational interpretation, it is the [Commissioner’s] conclusion that must be upheld.” *Burch*, 400 F.3d at 679.

Second, as to his shoulder injury sustained while skiing in February 2016, the ALJ noted that Plaintiff “delayed treatment initially for unknown reasons. He was advised to pursue physical therapy for two to three months to allow the fracture to completely heal before considering surgical intervention. Despite this advice, as of September 20, 2016, [Plaintiff] still had not tried formal physical therapy and was instead trying a home exercise program.” Tr. 20. Plaintiff argues that “the record shows conflicting opinions from treatment providers about

1 whether to pursue surgical intervention or physical therapy in June 2016. The fact
2 that [Plaintiff] chose to begin physical therapy (rather than surgical treatment) just
3 two months later should not be held against him, as (1) he was weighing his
4 options, (2) his fracture was healing; and (3) this does not constitute a significant
5 delay of time.” ECF No. 12 at 13 (citing Tr. 329, 334); see also ECF No. 17 at 2
6 (adding in his reply brief that this delay in seeking treatment should “not be held
7 against him” because “his disabling allegations are not related to his resolved right
8 shoulder issues”).

9 However, the Court’s review of the two records cited by Plaintiff in support
10 of this argument indicate that on July 7, 2016, Plaintiff was advised by physician
11 assistant, Mr. Greg McDonough, that he should consider surgical intervention after
12 an MRI revealed “moderate to high grade tearing” in his right shoulder. Tr. 334.
13 However, Mr. McDonough also noted that he would “review the MRI with Dr.
14 Rossi tomorrow and we will progress with surgical intervention if he agrees with
15 my recommendation.” Tr. 334. Subsequently, on July 8, 2016, according to the
16 second record cited by Plaintiff, Dr. Rossi reviewed the MRI and disagreed with
17 Mr. McDonough’s suggestion, instead recommending that Plaintiff “pursue a
18 continued nonoperative approach for the next 2-3 months with physical therapy to
19 allow the fracture to completely heal before consideration of surgical
20 management.” Tr. 329. Thus, despite Plaintiff’s argument to the contrary, the
21 final treatment recommendation to Plaintiff was to pursue physical therapy for 2-3

1 months; however, as noted by the ALJ, Plaintiff delayed pursuing this treatment
2 until September 21, 2016. Tr. 329, 349. Moreover, as discussed in detail below,
3 upon pursuing the recommended treatment, the record clearly indicates that
4 Plaintiff's right shoulder pain successfully resolved. Tr. 20-21 (citing Tr. 424, 429,
5 439, 441, 449, 451, 456-58, 466 (x-ray indicating healing greater tuberosity
6 fracture without displacement), 541 ("shoulder pain is actually resolved at this
7 point"). Based on the foregoing, it was reasonable for the ALJ to consider
8 Plaintiff's failure to comply with recommended treatment for his right shoulder
9 pain as a reason to discount the severity of his symptom claims. *See Orn*, 495 F.3d
10 at 638.

11 Third, as to his restless leg syndrome and sleep complaints, the ALJ found
12 that Plaintiff "repeatedly" delayed treatment and failed to follow treatment advice
13 and recommendations. Tr. 21-22. In support of this finding, the ALJ first noted
14 that "[m]ost of [Plaintiff's] more recent sleeping difficulties appear to be tied to his
15 use of Oxycodone, which he was repeatedly advised to stop taking. . . . He was
16 placed on Oxycodone in May 2015. By August 2015, [Plaintiff] stopped taking his
17 Oxycodone because he was advised that it might be affecting his sleep cycles and
18 causing him to not get a refreshing sleep." Tr. 21 (citing Tr. 576, 586). The ALJ
19 also found that Plaintiff "continued to use Oxycodone even though he reported in
20 March 2017 that he had good prior response to Neupro and the possibility was
21 raised of restarting this medication"; and it was noted in October 2018 that

1 Oxycodone was “suspected” to be interrupting his REM sleep, but Plaintiff was
2 very resistant to discontinuing the medication.” Tr. 21-22 (citing Tr. 500, 918,
3 929). However, as noted by Plaintiff, subsequent treatment records confirm that
4 neupro “failed” to control his restless leg syndrome, in addition to the failure of the
5 drugs gabapentin, klonopin, mirapex, requip, and sinemet; and despite treatment
6 providers’ observations that oxycodone was impacting his ability to sleep, Plaintiff
7 consistently was prescribed oxycodone throughout the relevant adjudicatory
8 period, and it was noted to be “effective in controlling his restless leg syndrome.”
9 ECF No. 12 at 13-14 (citing Tr. 540-41, 918 (transitioning from oxycodone to
10 methadone in 2018), 933-34); Tr. 473, 520, 530.

11 The Court declines to hold Plaintiff accountable for an alleged failure to
12 decline a medication that, while not without side effects, was consistently
13 prescribed and noted to be the only effective treatment in controlling his claimed
14 impairment of restless leg syndrome until, as discussed below, his restless leg
15 syndrome improved with the use of methadone. Based on the overall record, the
16 Court finds that Plaintiff’s ongoing use of oxycodone throughout the relevant
17 period, standing alone, does not rise to the level of substantial evidence to support
18 a finding that he failed to comply with treatment recommendations. However, any
19 error is harmless because the ALJ’s ultimate rejection of Plaintiff’s symptom
20 claims based on his failure to comply with treatment recommendations was
21 supported by substantial evidence. *See Carmickle*, 533 F.3d at 1162-63.

1 First, the ALJ noted evidence that Plaintiff was “struggling with CPAP
2 compliance,” and repeatedly failed to follow up with diagnostics as to optimize his
3 CPAP use. Tr. 21-22 (citing Tr. 313, 499-500, 541). Plaintiff fails to challenge
4 this finding with specificity in his opening brief; thus, the Court may decline to
5 address the issue. *See Carmickle*, 533 F.3d at 1161 n.2. In his reply brief, Plaintiff
6 briefly notes that he testified that the CPAP “dries out my sinuses, my throat, my
7 lips, my tongue – everything so bad, that I can’t wear one. So now I wear a mouth
8 guard that moves your lower jaw slightly forward, and it helps to keep your
9 airways open. . . . Maybe it’s not as good as a CPAP would be, but it’s – I’m not
10 waking myself up, choking or snoring anymore.” ECF No. 17 (citing Tr. 58).
11 Pursuant to Social Security Ruling 16-3p, an ALJ “will not find an individual’s
12 symptoms inconsistent with the evidence in the record on this basis without
13 considering possible reasons he or she may not comply with treatment or seek
14 treatment consistent with the degree of his or her complaints.” Social Security
15 Ruling (“SSR”) 16-3p at *8-*9 (March 16, 2016), *available at* 2016 WL 1119029.
16 However, Plaintiff’s personal preference to stop using the CPAP is not an adequate
17 explanation as to why he failed to follow up with recommendations from his
18 treating providers in order to adequately address his claimed impairment of sleep
19 apnea.

20 Second, the ALJ noted that Plaintiff’s medical providers advised him to
21 pursue behavioral health care for his sleep issues, but Plaintiff repeatedly declined.

Tr. 21-22 (citing Tr. 541, 906, 918 (recommending “strongly” that Plaintiff pursue behavioral health for counseling “to help address some of his underlying issues with regard to his insomnia”), 929). Plaintiff argues this “is not a legitimate reason to discount his testimony, as Plaintiff has not alleged any mental health impairments or symptoms in his DIB application or testimony.” ECF No. 12 at 14. This argument is inapposite. As specifically noted by the ALJ in support of this finding, Plaintiff’s treating providers recommended that Plaintiff pursue behavioral health treatment for possible “underlying issues” with his ability to sleep, not for any claimed mental health impairments. Thus, it was reasonable for the ALJ to consider Plaintiff’s refusal to comply with recommended health treatment as a reason to discount his symptom claims.

Based on the overall record, and regardless of evidence that could be considered more favorable to Plaintiff, the ALJ properly discounted Plaintiff’s symptom claims due to his repeated failure to seek and comply with treatment advice for his claimed impairments of back pain, shoulder pain, restless leg syndrome, and sleep issues. *See Burch*, 400 F.3d at 679 (ALJ’s conclusion must be upheld where evidence is susceptible to more than one rational interpretation).

3. Improvement

Third, the ALJ found that successful treatment of Plaintiff’s back pain, shoulder pain, and restless leg syndrome, was inconsistent with Plaintiff’s “statements about the intensity, persistence, and limiting effects of his symptoms.”

1 Tr. 19-21. A favorable response to treatment can undermine a claimant's
2 complaints of debilitating pain or other severe limitations. *See Tommasetti v.*
3 *Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008); *Warre v. Comm'r of Soc. Sec. Admin.*,
4 439 F.3d 1001, 1006 (9th Cir. 2006) (conditions effectively controlled with
5 medication are not disabling for purposes of determining eligibility for benefits).
6 In support of this finding, the ALJ cited treatment notes indicating that (1)
7 Plaintiff's back pain was "responding well to treatment and his functioning
8 improved"; (2) there was "quick and progressive improvement" of Plaintiff's
9 shoulder pain after initiating physical therapy, and a 2018 treatment note indicated
10 Plaintiff's shoulder pain had "resolved"; and (3) there was an "immediate"
11 improvement in Plaintiff's restless leg syndrome and insomnia after transitioning
12 from oxycodone to methadone in November 2018. Tr. 20-22 (citing Tr. 360, 365,
13 385, 424, 429, 434, 441, 451, 541 (shoulder pain is "resolved"), 638, 787-93
14 (describing "temporary worsening" of back pain but still noting his "treatment plan
15 seems to be effective"), 933-34 (improvement in restless leg syndrome and
16 insomnia)).

17 Plaintiff fails to address the evidence of improvement cited by the ALJ in his
18 opening brief. *See Carmickle*, 533 F.3d at 1161 n.2 (court may decline to address
19 issues not raised with specificity in Plaintiff's opening brief). In his reply, Plaintiff
20 argues (1) there was "exacerbation of back pain," and cites one October 2018
21 chiropractic treatment note that identifies restricted range of motion, "muscle

1 guarding/spasms,” multiple subluxations, and “acute aggravation” of pain in
2 Plaintiff’s back; and (2) he “suffered severe symptoms from [restless leg
3 syndrome]/sleep impairments throughout the vast majority of the relevant time
4 period, with ineffectiveness of numerous medications,” and “there is no indication
5 his November 2018 improvement [in his restless leg syndrome and insomnia] was
6 permanent.” ECF No. 17 at 4-6 (citing Tr. 780). However, the ALJ’s decision
7 includes consideration of relevant evidence from the adjudicatory period, including
8 “temporary worsening” of Plaintiff’s back pain in 2018, and the failure of
9 medications Plaintiff was prescribed in order to treat his sleep issues and restless
10 leg syndrome. Tr. 19-21 (citing Tr. 541, 787-93). Moreover, regardless of
11 evidence that could be interpreted more favorably to the Plaintiff, it was reasonable
12 for the ALJ to conclude that evidence of improvement in Plaintiff’s claimed
13 impairments was inconsistent with his allegations of incapacitating limitations.
14 *See Burch*, 400 F.3d at 679 (ALJ’s conclusion must be upheld where evidence is
15 susceptible to more than one rational interpretation). This was a clear, convincing,
16 and largely unchallenged reason for the ALJ to discount Plaintiff’s symptom
17 claims.

1 The Court concludes that the ALJ provided clear and convincing reasons,
2 supported by substantial evidence, for rejecting Plaintiff's symptom claims.²

3 **B. Step Four**

4 At the fourth step of the sequential evaluation process, Plaintiff has the
5 burden "to prove that he cannot perform his prior relevant work either as actually
6

7 ² The ALJ additionally "[did] not find [Plaintiff's] other impairments of restless leg
8 syndrome, obstructive sleep apnea, and chronic insomnia to be disabling because
9 [Plaintiff] was able to work with the conditions before the alleged onset date. His
10 prior diagnostic sleep study was administered as early as 2008 and revealed
11 moderate sleep apnea. [Plaintiff] continued to work for about eight years thereafter
12 until he had his skiing accident." Tr. 21 (citing Tr. 312). However, as noted by
13 Plaintiff, "his last work consisted of accommodated employment, as he called out
14 from work multiple times per month on average due to lack of sleep and extreme
15 fatigue in 2015." ECF No. 12 at 14. Moreover, Plaintiff's work history and
16 activities prior to the alleged onset date are of limited probative value. *See, e.g.,*
17 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008).
18 Regardless, as discussed in detail above, any error is harmless because the ALJ's
19 ultimate rejection of Plaintiff's symptom claims because he failed to comply with
20 treatment recommendations was supported by substantial evidence. *See*
21 *Carmickle*, 533 F.3d at 1162-63.

1 performed or as generally performed in the national economy.” *Carmickle*, 533
2 F.3d at 1166 (citing *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002)
3 (internal quotation marks omitted)). Past relevant work is work that was “done
4 within the last 15 years, lasted long enough for [claimant] to learn to do it, and was
5 substantial gainful activity.” 20 C.F.R. §§ 404.1565(a), 416.965(a). Here, at step
6 four, the ALJ found that Plaintiff was capable of performing past relevant work as
7 a mill operator. Tr. 22. More specifically, the ALJ found that Plaintiff

8 reported working for a mill from March 2000 to June 2002, again from
9 October 2002 to January 2004, and again from September 2011 to July
10 2012. Thus, [Plaintiff] performed such work within the last 15 years at
11 his most recent mill job. This job has an SVP level of six, which
12 requires one to two years of experience. While [Plaintiff] performed
13 this work for less than one year within the last 15 years, he has over
14 four years of experience at this job overall (see DI 25005.015 directing
15 that ‘[i]f any portion of the period the claimant performed past work
16 extends into the relevant 15-year period, the work is in the relevant
17 period. If it meets the other criteria for PRW, consider it at step 4 of
18 the sequential evaluation.’). [Plaintiff] earned \$13,354.70 from this job
19 in 2012, which is over substantial gainful activity for the entire year
20 even though [Plaintiff] only worked until July 2012. Thus, [Plaintiff’s]
21 job as a mill operator meets all three requirements of past relevant work.

Tr. 22-23 (citing Tr. 188, 204-10).

Plaintiff argues that DI 25005.015 “concerns a continuous period of one job
extending into the 15-year time period, with the following example: ‘The claimant
worked as a cashier from 01/20/96 to 12/10/2000. If the DDS adjudicates the case
on 1/20/15, the claimant’s cashier job is within the relevant period.’ The instant
case is readily distinguishable, as [Plaintiff] worked as a mill operator for an

1 isolated timeframe (September 2011 to July 2012) of less than one year during the
2 relevant 15-year period. The ALJ is incorrect to add on [Plaintiff's] remote mill
3 operator jobs from March 2000 to June 2002 and October 2002 to January 2004,
4 and nothing in DI 25005.15 suggests the ALJ's determination is proper." ECF No.
5 12 at 17 (citing DI 25005.015). The Court finds this argument unavailing for
6 several reasons. As an initial matter, while the POMS—an internal agency
7 manual—is “entitled to respect,” it “does not impose judicially enforceable duties
8 on either this court or the ALJ.” *Carillo-Yeras v. Astrue*, 671 F.3d 731, 735 (9th
9 Cir. 2011) (citations and internal quotation marks omitted). Regardless, the Court
10 finds that the ALJ properly found that the mill operator job satisfies the
11 requirements for past relevant work because it was done within the last 15 years,
12 lasted long enough for Plaintiff to learn to do it, and qualified as substantial gainful
13 activity. 20 C.F.R. §§ 404.1565(a).

14 First, despite any argument by Plaintiff to the contrary, the ALJ plainly did
15 not err in finding that the September 2011 to July 2012 “portion” of the period that
16 Plaintiff worked as a mill operator “extends” in to the relevant 15-year period,
17 thereby satisfying the first requirement for past relevant work because it was done
18 within the past 15 years. Second, and unchallenged by Plaintiff, the ALJ properly
19 found that the \$13,354.70 that Plaintiff earned from this job in 2012 was well over
20 substantial gainful activity for the entire year “even though Plaintiff only worked
21 until July 2012.” Tr. 23. Third, and finally, the ALJ found that Plaintiff has “over

1 four years of experience at his job overall,” including the work he did just prior to
2 the relevant 15-year period, from March 2000 to June 2002, and from October
3 2002 to January 2004. Tr. 22. The entirety of Plaintiff’s argument appears to rest
4 on whether the ALJ properly included Plaintiff’s mill operator work from before
5 the relevant 15-year time period in evaluating whether Plaintiff’s work as a mill
6 operator lasted long enough for him to learn to do it, because, as noted by the ALJ,
7 the position of mill operator is an SVP level of six, which requires one to two years
8 of experience. ECF No. 12 at 17; Tr. 22. However, as noted by Defendant, the
9 same authority cited by Plaintiff in support of his argument instructs the ALJ to
10 “[c]onsider work performed prior to the relevant period to be [past relevant work]
11 when there is a continuity of skills, knowledge, and work processes between the
12 work outside the relevant period and [past relevant work].” ECF No. 16 at 17
13 (citing POMS DI 25005.015 (“work lasted long enough for the claimant to learn
14 the job if he or she learned the techniques, acquired information, and developed the
15 facility needed for average performance of the job.”); *see also* Social Security
16 Ruling 82–62 at *2 (Jan. 1, 1982), *available at* 1982 WL 31386 (“The 15-year
17 guide is intended to insure that remote work experience which could not
18 reasonably be expected to be of current relevance is not applied. . . . [I]n some
19 cases work performed prior to the 15-year period may be considered as relevant
20 when a continuity of skills, knowledge, and processes can be established between
21 such work and the individual’s more recent occupations.”)).

1 Plaintiff fails to acknowledge this instruction from the same authority cited
2 in his opening brief, and in his reply only generally contends, without citation to
3 the record, that there is “no continuity of skills, knowledge, or work processes
4 between [Plaintiff’s] mill operator jobs.” ECF No. 17 at 9. Moreover, the Court
5 notes that at the hearing Plaintiff recounted the physical requirements and duties
6 associated with the mill operator job, including the type of machine used, a step-
7 by-step outline of how he used the machine, the specific material he used and how
8 it changed during the operation of the machine, the posture he assumed while
9 doing the job, the hazards he faced in doing the mill operator job, and the safety
10 measures in place to prevent the risk of harm. Tr. 45-50. Based on the foregoing,
11 the Court finds no error in the ALJ’s finding that Plaintiff’s mill operator job
12 satisfied the requirements of past relevant work.

13 Finally, Plaintiff contends that “even assuming *arguendo* that the mill
14 operator job could count as past relevant work, the [vocational expert’s] testimony
15 that [Plaintiff] could perform such work as actually performed was erroneous, as
16 [Plaintiff] later testified that the job consisted of being ‘[p]retty much on your feet
17 all day,’ and the ALJ limited [Plaintiff] to six hours of standing/walking in an eight
18 hour day.” ECF No. 12 at 17-18. Plaintiff is correct that “[i]f an ALJ’s
19 hypothetical does not reflect all of the claimant’s limitations, the expert’s testimony
20 has no evidentiary value to support a finding that the claimant can perform jobs in
21 the national economy.” *Bray*, 554 F.3d at 1228 (citation and quotation marks

1 omitted). However, as discussed in detail above, the ALJ's rejection of Plaintiff's
2 symptom claims was supported by the record and free of legal error. Moreover,
3 the Court notes that Plaintiff failed to offer any treating or examining medical
4 opinion evidence in support of his claims. The ALJ gave "great weight" to the
5 only medical opinion evidence in the record, the state agency reviewing opinions,
6 and this finding was not challenged by Plaintiff. Accordingly, the hypothetical
7 posed to the vocational expert contained the limitations reasonably identified by
8 the ALJ and supported by substantial evidence in the record. The ALJ did not err
9 at step four.

10 CONCLUSION

11 A reviewing court should not substitute its assessment of the evidence for
12 the ALJ's. *Tackett*, 180 F.3d at 1098. To the contrary, a reviewing court must
13 defer to an ALJ's assessment as long as it is supported by substantial evidence. 42
14 U.S.C. § 405(g). As discussed in detail above, the ALJ provided clear and
15 convincing reasons to discount Plaintiff's symptom testimony, and did not err at
16 step four. After review, the Court finds the ALJ's decision is supported by
17 substantial evidence and free of harmful legal error.

18 ACCORDINGLY, IT IS HEREBY ORDERED:

- 19 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.
- 20 2. Defendant's Motion for Summary Judgment, **ECF No. 16**, is

21 **GRANTED.**

The District Court Executive is hereby directed to enter this Order and provide copies to counsel, enter judgment in favor of the Defendant, and **CLOSE** the file.

DATED July 1, 2021.

s/ Rosanna Malouf Peterson
 ROSANNA MALOUF PETERSON
 United States District Judge